Filed 3/23/12 In re Anne S. CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

In re ANNE S., a Person Coming Under the Juvenile Court Law.	B235710 (Los Angeles County Super. Ct. No. CK84648)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. LYNN L., Defendant and Appellant.	

APPEAL from orders of the Superior Court of Los Angeles County, Stephen Marpet, Commissioner. Affirmed

Janette Freeman Cochran, under appointment by the Court of Appeal, for Defendant and Appellant.

Andrea Sheridan Ordin, County Counsel, James M. Owens, Assistant County Counsel, and Judith A. Luby, Principal Deputy County Counsel, for Plaintiff and Respondent.

Lynn L. (Mother), the mother of Anne S. and Joseph S., appeals the juvenile court's order denying without a hearing her petition under Welfare and Institutions Code[1] section 388,[2] and the juvenile court's termination of her parental rights as to Anne S. and Joseph S. following a section 366.26 hearing. As to the latter, she contends the court erred by declining to apply the beneficial relationship exception to termination of parental rights. (§ 366.26, subd. (c)(1)(B)(i)). We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Anne S. is almost three years old. Joseph S. is almost two years old.

Mother's first contact with child welfare authorities occurred in 2002 in Orange County, when an older child of Mother's, Helen, then three years old, was found wandering alone outside on a sidewalk.[3] Around 2004, Mother gave birth to a baby boy, Julian S. Helen and Julian came to the attention of the Orange County Social Services Agency in December 2007.

As stated by the Fourth Appellate District, Division Three, in an opinion rejecting Mother's appeal from jurisdiction/disposition in the prior Orange County case: "Prior to the events that led to detention, three-year-old Julian S. lived with [Mother], Joe. S., her boyfriend, and Julian's eight-year-old sister, Helen L. On December 24, 2007, Julian was brought to the hospital by paramedics with serious injuries. He was determined to have a closed head injury with a subdural hematoma, right frontal intracerebral hemorrhage,

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[1] All subsequent statutory references are to the Welfare and Institutions Code, unless otherwise indicated.

[2] Although Mother's notice of appeal states that she appeals from "all findings and orders made on 8/23/11 including termination of parental rights," Mother filed a request to construe notice of appeal to include an appeal from the July 27, 2011 order denying her section 388 petition. We determine that Mother's notice of appeal terminating parental rights should be liberally construed to encompass the denial of her section 388 petition because the juvenile court issued its denial within the 60-day period before the filing of Mother's notice of appeal. (*In re Madison W.* (2006) 141 Cal.App.4th 1447, 1450–1451.)

[3] On June 4, 2008, the juvenile court granted custody of Helen to her father, Christopher S., and dependency was terminated with exit orders.

cerebral edema, an occipital skull fracture, and multiple bruises on his face and body. There was also bruising on the front chest wall, multiple marks, which appeared to be bite marks, in different stages of healing all over his body. The marks were 'very observable.' Julian also had a broken rib, which was at least one month old. A social worker observed bruises on his right eye lid, chest and back. Julian was diagnosed with battered child syndrome." (*In re Julian S.* (January 22, 2009, G040508) [nonpub. opin.] p. 2.)

The Court of Appeal further found that "Julian's statements provided disturbing evidence that mother was complicit in, or at a minimum, knew about, the physical abuse. He stated that 'Mama holds me when Joe beats me,' and that 'Joe punched me hard in my chest and spanks me real hard. My mama was there where he hurts me.' When asked what his mother does, Julian stated, 'She whines.' During another interview, Julian stated that his mother was crying because Joe spanked him. He also reported that his mother was there when he was hurt. He demonstrated Joe's punches on a teddy bear as closed-fisted punches to the stomach. These statements support the conclusion that the mother was present, and her actions of crying and whining demonstrate her awareness of the seriousness of the abuse.

"There was other evidence from which the court could find the mother either knew or should have known of the abuse. Julian's doctor found bite marks all over his body, in different stages of healing. Some of these marks were in places, such as under his armpit and on his buttocks, that belie any claim of children's playground activity. Julian had bruises of various ages on his body and suffered a broken rib, consistent with a punch to the stomach, approximately one month before detention. These marks and injuries were or should have been obvious to any reasonable caretaker and were too extensive to support accidental injury." (*In re Julian S., supra*, G04050, at p. 10.)

The Court of Appeal affirmed the juvenile court's order to deny Mother reunification services. Mother's parental rights as to Julian were terminated on June 5, 2008, and his adoption was finalized on April 19, 2010.

The family came to the attention of the Los Angeles Department of Children and Family Services (DCFS) on October 9, 2010, when a DCFS social worker responded to a referral from the hospital where Joseph was born because Mother tested positive for barbiturates at the time of Joseph's birth. Joe S. (Father), had been convicted and sentenced to six years in state prison for child cruelty, as to Julian. DCFS detained Joseph. DCFS was unable to detain Anne because Mother said she did not know the whereabouts of her daughter. Mother said that Anne was adopted and living with relatives. Actually, Anne was living with a maternal cousin in Garden Grove. The minor was subsequently detained by DCFS.

On October 14, 2010, DCFS filed a section 300 petition, as to Anne and Joseph, and alleged under subdivisions (a), (b), (g) and (j) that there was severe physical abuse to a half sibling by Father, and Mother failed to take action to protect the half sibling. Furthermore, Mother has a history of substance abuse and is a current user of barbiturates.

On October 15, 2010, the juvenile court ordered Anne and Joseph detained and placed in shelter care. Pending disposition, Mother was offered reunification services, to wit, weekly random drug testing, drug counseling, parenting classes, and individualized counseling.

At the pretrial conference hearing on December 2, 2010, DCFS filed a first amended section 300 petition. The amended petition alleged that Father "was convicted on [March 9, 2010] of felony child abuse with an enhancement under Penal Code section 12022.7 for willfully inflicting great bodily injury including but not limited to multiple bruises [and] a skull fracture to the [half] sibling Julian." DCFS further reported that Mother was having monitored visits with the children.

The matter was set for an adjudication/disposition trial setting on January 21, 2011. The trial was set for February 2, 2011. On January 24, 2011, DCFS filed a request that the juvenile court take judicial notice of Mother's prior case in Orange County. The court continued the trial to February 9, 2011. On February 2, 2011, DCFS filed a motion for collateral estoppel as to the facts involved in Mother's prior Orange County case.

On February 9, 2011, DCFS reported that Mother completed a parenting skills course, but DCFS did not believe Mother was exhibiting signs of appropriate parenting. For instance, she did not appear to know how to change a diaper and failed to use good hygiene when caring for the children. In addition, Mother had tested positive for amphetamine/methamphetamine on November 15, 2010. Furthermore, Mother had enrolled in a six-month outpatient drug treatment program and attended "some" of the sessions.

At the hearing on February 9, 2011, the trial was continued to March 29, 2011 because Father had not been brought to court from prison. Mother's counsel informed the court that Mother would not be contesting adjudication, only disposition.

On March 29, 2011, the next date set for trial, DCFS reported that Mother continued to exhibit little or no skill in caring for her children at visits. DCFS also expressed concern that even knowing about Father's abuse of Julian, Mother stayed in a relationship with him, and had two children with him. However, DCFS also reported that Mother was visiting the children on a consistent basis and was participating in counseling. DCFS recommended that Mother not be provided reunification services pursuant to section 361.5, subdivision (b).

At trial, Mother submitted on jurisdiction and challenged DCFS's recommendation of no reunification services. The court took judicial notice of the prior Orange County court file and granted DCFS's request for collateral estoppel. DCFS placed its reports and other exhibits into evidence.

Mother testified on her own behalf for dispositional purposes, and asked the court to provide her reunification services. She stated that she has had parental rights terminated as to one child, but has been participating in individual therapy and in drug counseling and testing. She further reported that she had participated in four classes of anger management and four classes of a domestic violence program. She was employed part-time.

Mother testified that Father was in state prison and she would not let him be around the children unsupervised. She acknowledged that he had been found guilty of a

crime having to do with children and then further stated: "He did it." "I don't know what happened." "I think he may have." "He did it." She was not sure what happened in Orange County. She learned that she needed to focus on the children and that she did not have a drug problem.

Mother further testified she has the skills to protect the children from Father. After Orange County, she continued to have contact with Father and then had two children with him. She continued to have relations with Father because at that time she did not believe he had hurt Julian, because she did not see it. However, after his conviction, she changed her mind because the court had found him guilty. She stated that she has parenting skills.

Alicia Mena, a social worker, testified she recommended that Mother not be provided reunification services based on what happened in Orange County and Mother's mental state. In interviewing Mother, Ms. Mena discovered Mother was nonprotective and still did not believe abuse had occurred. After her parental rights to Julian were terminated, Mother still continued to see Father and conceived two children with him.

The juvenile court ordered no reunification services for Mother pursuant to section 361.5, subdivision (b)(6), (7), (11). The court set a section 366.26 hearing for July 27, 2011.

On April 29, 2011, Mother filed a section 388 petition. Mother requested reunification services on the grounds she had completed a 12-week domestic violence and anger management program, and had complied with all recommendations that were made by the social worker. Furthermore, the best interests of the children would be served by reunification with Mother because they are attached to her. The court denied the petition without a hearing on May 5, 2011.

On May 13, 2011, Mother filed a petition for extraordinary writ in propria persona. The petition was denied on June 23, 2011.

In the report prepared for the section 366.26 hearing on July 27, 2011, DCFS reviewed the Orange County case and the current case. The court ordered monitored visits for Mother in a DCFS approved setting. On April 19, 2011, DCFS learned that

Joseph was suffering from a broken femur possibly caused by Mother's carelessness during a supervised visit. There were two incidents described to DCFS on April 19 and 20, 2011, where Mother inappropriately handled Joseph. About two to three weeks earlier, Mother was holding Anne in one arm and Joseph in the other while entering the restroom at a McDonalds. The bathroom door closed on Joseph's left leg. Joseph cried and his leg turned red. There was a second incident that took place one or two weeks earlier, the foster mother reported, where she observed Mother almost drop Joseph during a visit, but prevented his fall by grabbing one of his legs. The foster parents reported that during that last visit between Mother and the children, Joseph was mostly ignored. Joseph is usually left in the car seat for more than half of each four-hour visit. The foster parents told DCFS that they have attempted to provide feedback to Mother, but she becomes angry whenever she is provided with information or suggestions about the children. For example, once Mother gave Joseph only four ounces of milk, then Joseph started crying. The foster mother informed her that Joseph was probably just hungry because he normally drinks eight ounces of milk. Mother became upset and yelled, "'Don't tell me what to do with my kids, this is my visit, you mind your own business.'" Foster mother further reported that Mother appears unaware of how to properly care for Joseph and would often grab and hold him roughly. As of April 28, 2011, Mother's visitation has been monitored by Human Services Aide (HSA) Maria Perez. Under HSA's supervision, Mother's visitation was initially restricted to the DCFS office, but after a period of time, HSA again accommodated Mother with visits in a neutral setting. According to Perez, from May to July 2011, Mother was always on time and had not missed any visits; Perez has no concerns at this time. The visits were for one hour per week. Mother brought food and drinks for the children and watched shows on the laptop with them. She changed their diapers. On two occasions, Anne cried at the conclusion of the visits. Mother kissed the children good-bye. Mother was affectionate with the children, and was cooperative. On two visits, Anne recognized Mother and yelled, "Mommy." However, DCFS reported that the quality of Mother's visitation does not appear to have improved, as she still needs close monitoring by Perez to ensure the

children's safety and well being, even though the children appear to enjoy certain aspects of the visits. Critically, the children are found to be adoptable. The children are currently placed in a foster-adopt home with caregivers that are interested in pursuing adoption. Moreover, Mother "ha[s] not assumed a parental role; therefore, visitation does not appear to be a barrier to adoption." DCFS recommended adoption as the permanent plan.

On July 27, 2011, Mother filed a second section 388 petition and requested that the children be returned to her, or in the alternative, that she be provided reunification services. She claimed she had "completed several programs including an intensive six-month outpatient drug treatment program, parenting education, anger management, domestic violence, codependency, and self esteem at Bienvenidos' Institute for Women's Health."[4] She provided certificates of completion. Mother further claimed that she has been visiting the children consistently, they know who she is, they enjoy visiting with her, she and the children are bonded, and she is able to appropriately care for the children.

On July 27, 2011, without a hearing, the court denied the petition on the grounds that the request does not state new evidence or a change of circumstances and that the proposed change of order does not promote the best interests of the children. The court scheduled the 366.26 hearing for August 23, 2011.

DCFS filed an addendum report for the 366.26 hearing in which it stated that the children are highly adoptable, healthy, with strong mutual attachments to the caregivers. Mother was afforded monitored visitation on July 21, 2011 and August 4, 2011. Both visits lasted one hour and were monitored. Mother played with the children on the playground and took photos. She praised the children and was cooperative when the visit ended. Still, DCFS contends Mother has not assumed a parental role.

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[4] Mother had enrolled at Bienvenidos' Institute for Women's Health for a six-month outpatient drug treatment program on October 25, 2010.

At the section 366.26 hearing on August 23, 2011, Mother and HSA worker Maria Perez testified on behalf of Mother. Perez testified that she monitors Mother's visits with the children once a week at the park. Mother brings food, snacks and fruit. Mother engages with Anne: she plays with her, takes her to the playground, feeds her, hugs her and says, "I love you" to the child. As for Joseph, she carries him, puts him on the swing and pushes him, changes his diaper when necessary and feeds him. The children appear to be happy with Mother, and Mother is affectionate with the children. During visits, Mother acts appropriately. Mother testified that she visits with the children once a week for an hour. In the past the visits were longer—two times a week for two hours or once a week for four hours.[5]

Mother's attorney argued that the section 366.26, subdivision (c)(1)(B)(i) exception to adoption applies because Mother has maintained regular visitation with the children and the children would benefit from continuing the relationship with Mother.

The court found the children to be adoptable, and that Mother had failed to establish the applicability of any statutory exception to adoption; thus, the court terminated parental rights. The court found that Mother's visits have always been monitored and she has not entered into a parental role. This appeal followed.

DISCUSSION

Section 388 petition

Mother contends that the court abused its discretion when it denied her section 388 petition without a hearing. We disagree.

We must uphold the court's determination of a petition to modify, unless the court clearly abused its discretion. (*In re S.R.* (2009) 173 Cal.App.4th 864, 870.) A hearing is required only if the section 388 petition presents prima facie evidence that circumstances have changed and that modifying the order would be in the child's best interest. (*In re*

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[5] There is nothing in the record to indicate why or when the visitation time was changed and reduced.

Zachary G. (1999) 77 Cal.App.4th 799, 806; Cal. Rules of Court, rule 5.570(d) [court may deny petition ex parte if it fails to state a change of circumstances or new evidence].)

Mother's petition asserted the following changed circumstances: "[Mother] completed several programs, including an intensive six month outpatient drug treatment program, parenting education, anger management, domestic violence, codependency, and self esteem at Bienvenidos' Institute for Women's Health. [Mother] also consistently visited [her] children." Mother attached verification of her completed programs.

We conclude Mother did not make a prima facie showing of changed circumstances. By the time of Mother's petition, her two children had been out of her care for nine months, a long time in the life of a young child. At the time of detention, Joseph had just been born and Anne was little more than a year old. Thus, the time they spent in foster care was significant: Joseph has never known anything other than foster homes; at the time of detention, Anne was still preverbal.

Mother started her program in October 2010. Yet, the program has brought little change. Her parenting skills remained questionable; due to her neglect, Joseph sustained a broken leg during a visit.

There was also no evidence Mother's attitude about her prior Orange County case had changed. At the disposition hearing on March 29, 2011, only four months before filing the petition, Mother testified that she was participating in drug counseling. However, at the same time, she denied ever having a drug problem. In addition, nothing suggested Mother ever resolved her failure to hold herself and Father responsible for Julian's severe injuries.

Mother's substance abuse counselor, after Mother completed an "intense" program (which Mother claims she did not need), could only say that Mother seemed to be "committed to advocating for the best interest and safety of her children." The counselor also recommended Mother continue "towards her spiritual understanding and relationships to provide her with the support system as she moves forward in her life." It was not clear that this counselor was even aware of the issues that caused DCFS to remove Mother's children from her care. Given these facts, and Mother's contact with

the child welfare system going back more than 10 years, her very recent completion of a six-month program, however intensive, was inadequate to show changed circumstances. Mother never progressed.

Mother's history with the child welfare system is long and serious. Julian, was brutally battered due to Mother's inability to protect him. A child has a "right to be protected from neglect and to 'have a placement that is stable [and] permanent.'" (*In re Jasmon O.* (1994) 8 Cal.4th 398, 419.) There was no reason to believe the children would have such a placement with Mother.

"The presumption that arises after termination of reunification services is a rebuttable one. It is presumed, at that point, that continued care is in the best interest of the child. The parent, however, may rebut that presumption by showing that circumstances have changed that would warrant further consideration of reunification." (*In re Marilyn H.* (1993) 5 Cal.4th 295, 310.)

As Mother did not make a prima facie showing that circumstances had changed, we are not required to determine whether modification of the order to reinstate reunification services would have been in the children's best interest. We note, however, that Mother did not specify how modifying the order to reinstate reunification services would be in the children's best interest.

Since March 2011, when reunification services were terminated, the children found stability in their foster care placements, and in the current placement with parents who sought to adopt them. To change the order would delay the solidification of the children's permanent placement.

The court did not abuse its discretion in denying Mother's section 388 petition without a hearing.

Section 366.26 hearing

Mother's contention is that the court erred by refusing to apply section 366.26, subd. (c)(1)(B)(i), commonly known as the beneficial relationship exception to adoption. We disagree.

At a section 366.26 hearing, where possible, adoption is the permanent plan preferred by the Legislature. (*In re L.Y.L.* (2002) 101 Cal.App.4th 942, 947.) If the juvenile court finds a child cannot be returned to his or her parent and is likely to be adopted if parental rights are terminated, it must select adoption as the permanent plan unless it finds that termination of parental rights would be detrimental to the child under one of several enumerated exceptions. (§ 366.26, subd. (c)(1)(B); see *In re L.Y.L.*, at p. 947.)

One exception is at issue here. The beneficial relationship exception of section 366.26 provides that if the juvenile court finds the child adoptable, "(c)(1) . . . the court shall terminate parental rights and order the child placed for adoption . . . unless . . . [¶] . . . [¶] (B) The court finds a compelling reason for determining that termination would be detrimental to the child due to one or more of the following circumstances: [¶] (i) The parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship." The parent bears the burden to establish the existence of one of the circumstances that are exceptions to termination. (*In re Thomas R.* (2006) 145 Cal.App.4th 726, 731.)

In the seminal case of *In re Autumn H.* (1994) 27 Cal.App.4th 567, the court interpreted the beneficial relationship exception to mean "the relationship promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents. In other words, the court balances the strength and quality of the natural parent/child relationship in a tenuous placement against the security and the sense of belonging a new family would confer. If severing the natural parent/child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed, the preference for adoption is overcome and the natural parent's rights are not terminated." (*Id.* at p. 575.) Various factors affect the parent/child relationship—such as the child's age, the portion of the child's life spent in the parent's custody, the effect of the interaction between the parent and child and the child's particular needs—and may be considered by the court in

considering the applicability of the beneficial relationship exception. (*Id.* at pp. 575–576; accord, *In re Zachary G.* (1999) 77 Cal.App.4th 799, 811.)

For the exception to apply, "the relationship must be such that the child would suffer detriment from its termination. [Citation.]" (*In re Angel B.* (2002) 97 Cal.App.4th 454, 467.) A parent who has failed to reunify with an adoptable child "may not derail an adoption merely by showing the child would derive *some* benefit from continuing a relationship maintained during periods of visitation with the parent," or that the parental relationship may be beneficial to the child to some degree. (*Id.* at p. 466.) The parent must also show that continuation of the parent/child relationship will promote "the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents." (*In re Autumn H., supra,* 27 Cal.App.4th at p. 575.)

The juvenile court's determination regarding the beneficial relationship exception is upheld if supported by substantial evidence. (*In re B.D.* (2008) 159 Cal.App.4th 1218, 1235.)[6]

Mother contends that sufficient evidence was presented to establish the beneficial relationship exception. She argues her visitation was consistent, the interaction of the children and Mother during visits was appropriate, caring and attentive.

While the record in this case establishes that Mother maintained regular visitation with Anne and Joseph, a more fundamental problem lies in the quality of the parent/child relationship. The beneficial relationship exception does not apply if a parent does not occupy a parental role in his or her child's life. (*In re B.D., supra,* 159 Cal.App.4th at p. 1234.) "[T]o establish the exception . . . , the parents must do more than demonstrate 'frequent and loving contact' [citation], an emotional bond with the child, or that the

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[6] Some courts apply the abuse of discretion standard of review. (See *In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1351; *In re Aaliyah R.* (2006) 136 Cal.App.4th 437, 449.) But, as observed in *Jasmine D.*, there are minimal practical differences between the two standards and, on this record, we would affirm under either standard. (*In re Jasmine D.*, at p. 1351.)

parents and the child find their visits pleasant. [Citation.]" (*In re Andrea R.* (1999) 75 Cal.App.4th 1093, 1108.) A relationship sufficient to support the beneficial relationship exception typically "aris[es] from day-to-day interaction, companionship and shared experiences." (*In re Casey D.* (1999) 70 Cal.App.4th 38, 51.)

There is some evidence the children enjoyed visits with and were usually happy to spend time with Mother. There is, however, no evidence in the record that Mother had a substantial parental relationship with the children such that "severing the natural parent/child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed . . . ." (*In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 575.)

Mother undoubtedly loves Anne and Joseph and wants to be in a position in which she is able to care for them. While Mother completed a six-month program of various programs to make improvements and visited with and loved the children, she did not provide evidence that her relationship with the children was significantly beneficial to outweigh the benefits to the children of adoption. Even frequent and loving contact with a child in these circumstances is insufficient to meet the requirements of the exception. (*In re Beatrice M.* (1994) 29 Cal.App.4th 1411, 1418–1419.) The evidence does not reflect that the strength of Mother's relationship with the children outweighs the sense of belonging Anne and Joseph would receive from a stable home. (*In re Dakota H.* (2005) 132 Cal.App.4th 212, 229.)

By the time of the section 366.26 hearing, Mother had not reached a position where she could assume her parental responsibilities or provide the children any degree of stability. She assumed the role of a friendly visitor. She had monitored visits one time a week for one hour in a park. This does not establish that she had a parental role, as opposed to a playmate role. Consequently, Mother was unable to establish that the benefits of her relationship with Anne and Joseph would outweigh the benefits the children would gain in a permanent home, or severing her relationship with the children would be detrimental to the children. As in this case, "if an adoptable child will not suffer great detriment by terminating parental rights, the court must select adoption as the

permanency plan." (*In re Dakota H., supra,* 132 Cal.app.4th at p. 229.) The record before us provides ample support for the juvenile court's conclusion that the beneficial relationship exception did not apply.

DISPOSITION

The order denying the section 388 petition without a hearing and the order terminating parental rights are affirmed.

NOT TO BE PUBLISHED.

JOHNSON, J.

We concur:

ROTHSCHILD, Acting P. J.

CHANEY, J.